SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1121

LENA ESDERTS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM J. ESDERTS, DECEASED,

Petitioner,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Question Presented	1
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	11

CITATIONS.

Cases.

Dennis v. Denver & Rio Grande Western Railroad Co., 375 U. S. 208 (1963)	7
Hullum v. St. Louis Southwestern Ry. Co., 384 S. W. 2d 163 (Tex. Civ. App. 1964) (certiorari denied 382 U. S. 906, rehearing denied 382 U. S. 949)	6
Lavender v. Kurn, 327 U. S. 645 (1946)	7
People v. Somerville, 71 Ill. App. 2d 381, 219 N. E. 2d 116 (1966) (leave to appeal denied 34 Ill. 2d 630)	8
Rogers v. Missouri Pacific R. Co., 352 U. S. 500 (1957)	5
Valant v. Metropolitan Life Insurance Company, 312 Ill. App. 262, 38 N. E. 2d 369 (Case No. 41844, Abstract decision, 1941)	8

Texts.

57 ALR 2d 1011	8
Century Digest System, Evidence, Section 307(3)	8

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QUESTION PRESENTED.

No recurring questions of construction or application of the Federal Employers' Liability Act are involved; the petitioner is complaining solely about trial court rulings concerning state law of evidence and procedure in general. The only basic question presented is: Should this Court review the upholding of a jury verdict in a routine and insignificant FELA case simply because it was in the defendant's favor?

STATEMENT OF THE CASE.

The petitioner's statement is inaccurate, confusing and incomplete. Respondent accordingly amplifies:

Petitioner's decedent, Esderts, lost his life when the motor car he was operating struck a derail and overturned.

All receiving, delivery and storage tracks on the Rock Island leading into a main line are equipped with a derail device to protect the main line (Abstract 93, 137; Record 482). The same is true in the railroad industry throughout the United States (Abstract 86). Government rules require that every derail must be kept in the closed position (Abstract 93; Rule 245, Abstract 78-79). Each derail has a lock for this purpose (Abstract 93).

The decedent, Esderts, became a Rock Island bridge and building foreman in 1952 and had been assistant foreman before that (Abstract 180). Esderts knew the rules and had his own personal key to the derail lock (Abstract 156, Record 698; Abstract 93, 108). Esderts and his repair crew started to work on the bridge in March, 1952 (Abstract 155).

On June 5 of that year, at about quitting time, Esderts and Peet, a member of the crew, left the crew's bunk car and started out to the bridge to pick up the crew on the customary motor car (Abstract 30). The motor car was not then on the main line, but on one of the service tracks (Abstract 30).

The switch foreman, who was about three tracks over from the motor car, waved as it passed him; he testified that Esderts waved to him (Abstract 170, 164, 169). The accident happened almost immediately thereafter (Abstract 31); the car was diverted from the track when it struck a derail which was in its usual and proper locked position (Abstract 95). The derail was yellow in color

(Abstract 136, 149, 159, 164-165, 167) and the motor car at the time of the accident was being operated backwards by Esderts in violation of Safety Rule 161 (Abstract 37, 158).*

The derail sign was *not* obscured by weeds (Abstract 94, 96, 137, 165); it *could* be read very plainly (Abstract 165); its lettering *was* legible (Abstract 149, 131, 136, 159, 160, 165); and it was *not* freshly painted the day following the accident (Abstract 96, 136, 162, 105).

Petitioner twice mistakenly asserts that the derail sign was painted the day after the accident (Petition, page 6). Not only is this conclusively disproved by the testimony cited above, but the very witness upon whom petitioner relies flatly stated, "It was not freshly painted on June 6, 1952" (Abstract 14). His further testimony, "On June 6 the post was painted . . ." (Abstract 14), understood in its proper context, meant simply that on that date it was not an *unpainted* post, but one that had been painted at some earlier time.

Similarly unsupported by the record is petitioner's assertion that the weeds were cut that same following day (Abstract 98, 139, 160, 159). Photographs taken the day following the accident conclusively show no fresh painting and no fresh cutting of weeds (Abstract 15-16, 131-132, 165, 97, 160).

The statements of the witness Peet (Defendant's Exhibits 4 and 11) were offered and admitted into evidence during the trial, even before petitioner offered rebuttal evidence (Additional Abstract 14-16; Appellate Court's

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* Petitioner incorrectly insists (Petition, pages 5-6) that the Appellate Court misstated these facts.

Opinion, Petition pages 9a-10a).* Further, petitioner's attorney stated that if respondent did not offer Exhibit 4, he would do so. After respondent offered it, petitioner's attorney stated he had no objection (Additional Abstract 16-17). In fact, in his closing argument he read this exhibit to the jury (Supplemental Abstract 56-61), interpolating his reading with the comment, "This is just what he said, isn't it?" (Supplemental Abstract 57-59). The Appellate Court accordingly found that petitioner was not prejudiced (Petition, pages 14a-15a).

The record, set out in the Appendix to the petition, shows without contradiction that petitioner's counsel agreed to the court reading Exhibits 4 and 11 to the jury (Petition, pages 35-36), and the Appellate Court so found (Petition, pages 12a, 19a). That court also held that not only was petitioner not confronted with a choice of two errors (as the petition argues) but that, in fact, the procedure suggested by the trial court was "a fair solution" to which both parties agreed (Petition, page 19a).

REASONS FOR DENYING THE WRIT.

This is a common garden FELA case that is limited solely to its own peculiar and non-recurring facts. It presents no questions of interpretation or application of the Federal Employers' Liability Act and is of no general importance or interest. The only questions raised relate solely to state procedure and evidence.

Moreover, there is clearly no conflict with the decisions of this Court or any other court. In fact, the decision

* Petitioner's statements that they were not "admitted into evidence during the course of the trial" (Petition, page 6) and were "never introduced in evidence until after final arguments" (Petition, page 13) are patent misstatements. That part of the record showing their admission was omitted from both petitioner's Abstract and Supplemental Abstract. Respondent was forced to file an Additional Abstract.

below conforms fully with this Court's explicit admonition in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, that it is the jury's function to determine the factual question of liability. The judgment on the jury's verdict, the Appellate Court's affirmance, and the Illinois Supreme Court's refusal to grant leave to appeal were correct and there is no warrant for further review here.

I.

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957), this Court specifically recognized that Congress vested the function of decision in FELA cases solely in the jury; thus (at page 510):

> ". . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury . . ."

The Court was equally explicit that a jury could find against liability; for, in that case, in setting aside the state Supreme Court's reversal of a verdict for the plaintiff on the ground that plaintiff's evidence did not support the finding of defendant's liability, this Court said (at page 504):

> "We interpret the foregoing to mean that the Missouri court found as a matter of law that the petitioner's conduct was the sole cause of his mishap . . .
>
> "We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make . . ."

Here, the jury made the decision and this Court should deny certiorari as it did in precisely the same circum-

stances in *Hullum* v. *St. Louis Southwestern Ry. Co.*, 384 S. W. 2d 163 (Tex. Civ. App., 1964) (certiorari denied 382 U. S. 906; rehearing denied 382 U. S. 949). In the *Hullum* case a jury verdict for the defendant was affirmed on appeal; the state appellate court declared (pages 172-173):

> "... *This decision* [*the Rogers case*] *is thought to be applicable to the right of the employer as well as to the right of the employee.* Certiorari was denied in each of the following cases where the employee sought to overturn an adverse jury verdict ..." [citing 8 cases.]
>
> "In *Tennant* v. *Peoria & P. U. R. R.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, the Supreme Court in a F. E. L. A. case said:
>
> > 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'
>
> * * * * *
>
> "We hasten to add, however, that we have had occasion to review all of the evidence in the case and have concluded that the findings of the jury are not so against the weight and preponderance of the evidence as to be manifestly wrong and unjust." (Emphasis added.)

Similarly, in the instant case the Appellate Court reviewed the record and concluded:

> "It is our opinion from reading the entire record that it was not unreasonable for the jury to reach the conclusion that it did. The evidence, although in conflict, was sufficient for the jury to find that no negligence of the railroad contributed wholly or partially to Esderts' injury and death ..." (Petition, page 5a).
>
> "There was a solid evidentiary basis for the jury's verdict and neither the trial involvements nor the procedural deviation, nor the defendant's final argument deprived the plaintiff of a fair trial. The judg-

ment of the Circuit Court is affirmed." (Petition, page 22a).

In reviewing the record, the court was but exercising its proper function under *Lavender* v. *Kurn*, 327 U. S. 645 (1946). In that case, this Court, speaking of a jury's verdict, said at page 653:

> "... Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."*

Here, whatever conflict there may have been in the testimony was resolved by the jury in defendant's favor. Since there was an evidentiary basis for that verdict, it would have been "an undue invasion of the jury's historic function" for the Illinois Appellate Court "to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury" (*Lavender* v. *Kurn*, 327 U. S. at 652-653).

II.

Petitioner's claims of erroneous procedural rulings are without substance:

A.

When the trial court initially stated that the two statements of the witness Peet (Defendant's Exhibits 4 and 11) would go to the jury, plaintiff made *no* objection (Supple-

* This holding was reiterated and reconfirmed in *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U. S. 208, 210 (1963).

mental Abstract, page 60). Second, they did not go to the jury; but if they had it would not have been error under the Illinois authorities. Plaintiff's statement to the contrary (Petition, page 11) is simply not true.

People v. *Somerville,* 71 Ill. App. 2d 381, 219 N. E. 2d 116 (1966), (leave to appeal denied, 34 Ill. 2d 630) is conclusive. It is there said at pages 388-389:

> "Defendants' next contention is that it was reversible error to permit the jury to take a copy of Arnold's statement to the jury room during their deliberations. In *People* v. *Allen,* 17 Ill. 2d 55, 160 N. E. 2d 818, our Supreme Court held that where the defendant failed to object in the trial court to the taking of exhibits to the jury room, that error was waived for purposes of appeal. 17 Ill. 2d at 62. The Court went on to hold:
>
> > It is well established that the matter of whether exhibits should be taken to the jury room is within the sound discretion of the trial judge and his ruling will not be disturbed unless there was an abuse of such discretion to the prejudice of defendant. (*People* v. *Ciucci,* 8 Ill. 2d 619.) We are of the opinion that no such abuse of discretion of prejuddice is shown here. (17 Ill. 2d at 62, 63.)
>
> While it may not have been necessary to have Arnold's statement read to the jury after he had orally testified to its contents, or to permit the statement to be taken to the jury room, we hold that it was not an abuse of discretion to do so, and that the defendants were not prejudiced thereby."

The same was held in *Valant* v. *Metropolitan Life Insurance Company,* 312 Ill. App. 262, 38 N. E. 2d 369 (Case No. 41844 Abst. decision 1941).

But even if the Illinois rule were otherwise, the procedure of sending exhibits to the jury is purely a question of local practice and differs from state to state.* This issue clearly

* See Annotation in 57 ALR 2d 1011—"Propriety and effect of jury in civil case taking depositions to jury room during deliberations"; Century Digest System, Evidence, Section 307(3).

has no far-reaching application or effect and is manifestly not one that warrants plenary review by this Court.

B.

Equally without merit are petitioner's additional claims that the trial court erred in failing to assess the impeaching quality of Peet's statements and to allow petitioner to offer rebuttal evidence (Petition, pages 12-13). The Appellate Court recognized that there were inconsistencies between Peet's testimony and his statements but that petitioner made no effort to explain or rebut them (Petition, pages 18a, 16a).

The claim that impeaching evidence was allowed to be treated as substantive evidence is ludicrous, because petitioner herself used the statements *as substantive evidence* in her *own* behalf and read them to the jury at length (Petition, page 15a; Supplemental Abstract, pages 56-61).

III.

Petitioner also objects to a portion of respondent's argument to the jury as prejudicial, principally because, she says, respondent's counsel twice repeated an objectionable statement after an objection had been sustained (Petition, pages 13-15). This is not true; petitioner's plaint of impropriety and prejudice is a misrepresentation of the record.

A reading of the quoted excerpt shows that, while the court did sustain the objection to the statement that Iowa residents would not believe petitioner's claim that the weeds were four and a half feet high (Supplemental Abstract 30-31), no objection was made to the statement that the jury was being asked to believe that the weeds had attained that height by early June (Supplemental Abstract 31). The court's final ruling (Supplemental Abstract 31) related

back to, and ordered stricken, only the *earlier* statement referring to what Iowa natives would believe; it did not refer to what petitioner wanted the jury to believe. Obviously, it did not because it was proper argument.*

IV.

Petitioner's final argument (Petition, pages 19-20) of a deprivation of constitutional rights because, at the time the petition for leave to appeal was denied, two vacancies existed on the Supreme Court of Illinois is plainly frivolous. The same argument was presented by petitioner to the Supreme Court of Illinois in a motion for rehearing and was denied by the *full* court of seven Justices after the vacancies had been filled. Moreover, if petitioner's argument were accepted, then all decisions of the Illinois Supreme Court, of this Court and other courts during similar periods of unfilled vacancies would be subject to attack.

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* Petitioner's other contentions—that this argument was the injection of a question of law before the jury, *i.e.*, a question of venue, and that it was improper to argue that respondent would have been liable solely because of Esdert's action if a third party (or Peet) had been injured—are patently without merit. The Appellate Court rightfully rejected petitioner's interpretation of the facts and the law as to both. The court characterized petitioner's inferences as to the first "farfetched" and her apprehensions as "magnified beyond reason" (Petition, pages 21a-22a). As to the second, respondent could be liable to a third person (or Peet) only because of Esdert's action; it was the *sole* cause of the accident. The jury weighed the evidence, found for respondent and the Appellate Court affirmed, holding there was no merit to petitioner's contention (Petition, page 22a).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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